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# Natural Law as Part of International Law: The Case of the Armenian Genocide

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# Natural Law as Part of International Law: The Case of the Armenian Genocide

FERNANDO R. TESÓN\*

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In this Article I argue that some norms are part of international law even if they have never been created by treaty or custom. Because such norms have never been posited, they are natural law norms, and my thesis is that these natural law norms are as much part of international law as the posited norms.<sup>1</sup> By this I mean that these norms should figure in any catalog of what international law prescribes or permits.

Despite a venerable lineage that goes back to Aquinas, Grotius, Vitoria, Puffendorf, and more modernly, the nineteenth-century Scottish scholar James Lorimer, the twentieth-century Austrian publicist Alfred Verdross,

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1. I use the word *norms* to avoid prejudging whether the subjects at issue are rules or principles in Ronald Dworkin's sense.

and I think, Ronald Dworkin, the view I defend here is unpopular these days.<sup>2</sup> In fact, it is so unpopular that I feel compelled to say what I am *not* claiming. First, I do not endorse any particular metaphysics that may be associated with the classical natural law tradition. I am aware that many readers are alarmed by the word *natural*. But in this Article, I do not mean anything that requires a complicated ontological or metaphysical background. Second, I express no views about the desirability of enforcement of these natural law norms. By *natural law norm*, I mean a normative proposition that is binding on those to whom it is addressed but has not itself been created by any actual social process such as legislation, treaty, or custom. My only point is jurisprudential: these nonenacted norms are part of international law, and they are *legal* norms, not merely desirable moral norms. Finally, I do not offer a list of those norms but examine only one of them—the prohibition of state-conducted mass murder. I argue that this prohibition has been part of international law since the emergence of nation-states, even before the Genocide Convention, the Nuremberg trials, and other twentieth-century developments.<sup>3</sup>

If I can make a credible case for this particular norm, then I will have shown that natural law analysis is possible. I do not inquire here whether my method yields other international norms. But I will be satisfied if I can persuade readers that the prohibition of state-conducted mass murder is a natural law norm, even if readers thought that this was the *only* natural law norm. And I agree with critics of natural law that most norms are and should be conventional. Certainly a function of positive international law is to make norms concrete and determinate; without that determination, natural law norms, and any general positive norms, for that matter, may be hard to apply to concrete cases. But this concession does not undermine my central point that these norms are part and parcel of international law.

I propose what I hope will be a plausible natural law approach, one that, I hope, is free from the traditional objection of arbitrariness that has been leveled against it. My claim is that the very concept of international

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2. See, e.g., 1 JAMES LORIMER, *THE INSTITUTES OF THE LAW OF NATIONS: A TREATISE OF THE JURAL RELATIONS OF SEPARATE POLITICAL COMMUNITIES* (London, William Blackwood & Sons 1883); ALFRED VERDROSS & BRUNO SIMMA, *UNIVERSELLES VÖLKERRECHT: THEORIE UND PRAXIS* (3d ed. 1984).

3. Other candidates for natural law international norms are the prohibition of official torture, now supported by a wide consensus but not by practice, and the rest of the “Great Crimes” of international criminal law, now codified, *inter alia*, in the Rome Statute of the International Criminal Court arts. 5–8 *bis*, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

law entails some elementary normative propositions.<sup>4</sup> The prohibition of state-conducted mass murder is one of such propositions.

#### I. A CASE STUDY: RESPONSIBILITY FOR THE ARMENIAN GENOCIDE

Starting in April 1915, the government of the Ottoman Empire killed about 1.5 million of its Armenian citizens in the Turkish province of Eastern Anatolia. They were mostly unarmed civilians—men, women, and children. Many of them were murdered; the rest were marched to death into the Syrian Desert. Many endured rape and beatings; few survived. There is widespread agreement about these facts, which are amply documented.<sup>5</sup>

This horrifying historical incident gives rise to an important legal question: Does the *current* Turkish state bear international responsibility for the 1915 massacres?

I distinguish this legal question from several related issues. First, the legal question must be severed from the distracting politics of the Armenian genocide, important as they may be, especially for the Armenian community. For a long time now, the Armenian community has insisted that Turkey acknowledge its responsibility, apologize, and pay reparations.<sup>6</sup> Governments have generally sided with the Armenians: twenty-one countries, including Russia and France, as well as forty-three states of the United States of America, have recognized the events as genocide.<sup>7</sup> However, the Turkish government has steadfastly refused. According to Turkey, there was no will to exterminate the Armenian population and

4. In a sense of “entailment” that I will soon clarify.

5. See, e.g., TANER AKÇAM, *A SHAMEFUL ACT: THE ARMENIAN GENOCIDE AND THE QUESTION OF TURKISH RESPONSIBILITY* (Paul Bessemer trans., Metropolitan Books 2006) (1999); RAYMOND KÉVORKIAN, *THE ARMENIAN GENOCIDE: A COMPLETE HISTORY* (I.B. Tauris & Co. 2011) (2006).

6. Armenian advocates maintain a website that updates developments related to the genocide. See ARMENIAN NAT’L INST., <http://www.armenian-genocide.org> (last visited Feb. 20, 2014).

7. The list is available online. See *Countries That Recognize the Armenian Genocide*, ARMENIAN NAT’L INST., [http://www.armenian-genocide.org/recognition\\_countries.html](http://www.armenian-genocide.org/recognition_countries.html) (last visited Feb. 20, 2014); *International Affirmation of the Armenian Genocide*, ARMENIAN NAT’L INST., [http://www.armenian-genocide.org/current\\_category.11/affirmation\\_list.html](http://www.armenian-genocide.org/current_category.11/affirmation_list.html) (last visited Feb. 20, 2014).

the deaths were unfortunate incidents of war.<sup>8</sup> Additionally, the Turkish government, apparently supported by Turkish public opinion, sees this demarche as no less than a new effort of the West to humiliate Turkey and Islam—as a new crusade.

Second, I do not address whether the Ottoman Empire's actions were technically genocide. An inordinate amount of the debate has been devoted to whether or not this emblematic word should be used to describe the events of 1915. Just recently, President Obama incurred the wrath of the Armenian community and human rights activists for refusing to use the word, an omission attributed to the President's reluctance to offend an important Muslim ally.<sup>9</sup> As indicated, Turkey's official position is that the events of 1915 did not constitute genocide because the government of Turkey did not have the specific intent to exterminate the Armenians, as required by the applicable rules.<sup>10</sup> Armenian advocates hotly dispute this and point to documentary evidence that the killings were deliberately planned with intent to eliminate the Armenians from the Ottoman Empire.<sup>11</sup>

I find this debate rather sterile, notwithstanding its considerable political and symbolic significance. Whether or not we call the 1915 events *genocide* is a purely verbal question because even if the murderers lacked the specific intent to exterminate a sufficiently specified group—an intention superimposed on the murderous intent—mass murders are equally egregious. Whether we decide to call the events of 1915 *crime against humanity* instead of *genocide* would not alter the issue of substantive responsibility. Nor is mass murder less serious as a crime than genocide. It is understandable that Armenian advocates would fiercely attempt to convince the world that the massacres constituted genocide. It is equally understandable that Turkey would reject with equal intensity the application of a word so loaded with condemnation. But words lack magical power. However we call these events, we want to know if Turkey should be held responsible for them today.

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8. Turkey argues both that the genocide never happened and that the word *genocide* is inapplicable. See *Turkish PM Scorns Armenia Apology*, BBC NEWS (Dec. 17, 2008, 5:24 PM), <http://news.bbc.co.uk/2/hi/europe/7788486.stm>.

9. See Matt Welch, *Obama Again Breaks Promise To Call Armenian Genocide a 'Genocide'*, REASON.COM (Apr. 29, 2013, 8:31 AM), <http://reason.com/blog/2013/04/29/obama-again-breaks-promise-to-call-armen>.

10. See Haig Khatchadourian, *Compensation and Reparation as Forms of Compensatory Justice*, 37 METAPHILOSOPHY 429, 442–43 (2006). According to the 1948 Genocide Convention, “genocide means [a number of acts, including deliberate killing] committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.” Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, 78 U.N.T.S. 278 [hereinafter Genocide Convention].

11. See Roger W. Smith et al., *Professional Ethics and the Denial of Armenian Genocide*, 9 HOLOCAUST & GENOCIDE STUD. 1, 2–3 (1995).

The third question I bypass is that of international criminal responsibility. All the perpetrators are dead, so no criminal prosecution is possible. Instead, this is a case of international state responsibility, which, if established, would generate an obligation of reparation. Of course, if a government official perpetrates an international crime that generates criminal individual responsibility, that act is *a fortiori* an international wrong that generates state responsibility. An interesting issue is what legal conclusion we should draw from the fact that this is not a criminal prosecution but a question of state responsibility. It might be argued, for example, that the worries we may have about retroactivity are not as strong in a case of state responsibility, which after all can be settled with compensation, as it is in the case of criminal prosecution, where the issue, as in the Nuremberg trials, was whether or not to punish the defendants. I do not, however, pursue this line of argument because I do not think that establishing Turkey's current responsibility for the massacres requires retroactive application of international law.

The fourth problem I avoid is that of identifying the eventual beneficiaries of compensation. There is heated debate about whether Turkey, if found liable, should compensate the actual descendants of the survivors, the Republic of Armenia, which is a state, the Armenian community at large, the Armenian diaspora, or all of the above.<sup>12</sup> It may well be that there are insurmountable difficulties to implementing Turkey's obligations, but again, this issue is separate from the question of Turkey's substantive responsibility.

The final question I set aside is whether there is a proper jurisdiction somewhere that could conceivably adjudicate this dispute. I do not endorse the view that there is no international responsibility unless and until a court or similar body has so adjudicated. There is no reason to hold that view as a matter of jurisprudence, and in practice many questions of responsibility are decided by diplomatic negotiation. This procedural issue, then, is separate from the substantive issue of responsibility that I address in this Article.

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12. See, e.g., Henry C. Theriault, *The Reparations Movement and Meaningful Resolution of the Armenian Genocide*, ARMENIAN WEEKLY, Apr. 2010, at 27, 29–30.

## II. THE RULES OF INTERNATIONAL STATE RESPONSIBILITY

Well-established international legal rules govern the conditions under which a state is internationally responsible for wrongful acts. Under the United Nations Draft Articles on State Responsibility (ASR), “[e]very internationally wrongful act of a State entails the international responsibility of that State.”<sup>13</sup> The act in question must be attributable to the state. The rules of attribution are complex, but the idea is that purely private acts do not generate the responsibility of the state unless the state somehow condones or endorses them or is negligent in preventing them.<sup>14</sup> When a state is responsible for a wrongful act, it must compensate the victim: “The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. Injury includes any damage, whether material or moral, caused by the internationally wrongful act . . . .”<sup>15</sup> Finally, and crucially for my analysis here, Article 13 of the ASR establishes an intertemporal rule: “An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.”<sup>16</sup>

The first legal question is whether the current Turkish state is a *successor* of the Ottoman Empire. This is an easy one. The answer is indisputably yes, and this is not denied by Turkey. Under the well-established rule of the continuity of the state, a new government of a state is internationally responsible for the breaches of international law committed by previous governments of that same state.<sup>17</sup> State practice has consistently rejected attempts to bypass this.<sup>18</sup> Therefore, the current Turkish government is the legal successor of the Ottoman Empire. If the massacres perpetrated by the Ottoman government in 1915 constituted an internationally wrongful act, then present-day Turkey, as the legal successor, is obligated to compensate the victims. As mentioned above, maybe there are no plausible beneficiaries of the compensation, but

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13. See Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Rep. of the Int'l Law Comm'n, 53d Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10, at 26 (2001), available at <http://legal.un.org/ilc/reports/2001/2001report.htm> [hereinafter ASR]. Most rules contained in this document are widely seen to reflect customary law.

14. *Id.* at 38.

15. *Id.* at 28 (paragraph numbering omitted).

16. *Id.* at 27.

17. See T.J. LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW §§ 48–49 (7th ed. 1923).

18. For example, the German government, as a successor to the Third Reich, continues to compensate victims of the latter's crimes. See, e.g., Agreement Between the State of Israel and the Federal Republic of Germany, Isr.-Ger., art. 1, Sept. 10, 1952, 162 U.N.T.S. 206.



assuming there is a plausible beneficiary,<sup>19</sup> Turkey has an obligation to compensate *if* the massacres constituted an international wrong in 1915.<sup>20</sup>

### III. THE POSITIVIST ANSWER: THE PROBLEM OF RETROACTIVITY

According to some legal scholars, the international responsibility of present-day Turkey for the events of 1915 is problematic.<sup>21</sup> Although they agree that Turkey is the legal successor of the Ottoman Empire, they deny that Turkey can be held responsible today because the events of 1915, horrific as they were, were not wrongful acts under the international law applicable at the time. On this view, the law of human rights, and in particular the criminalization of massive state violence against civilian populations, is a creature of the post-World War II era. As is well known, the Holocaust and similar events prompted the international community to add the crime of genocide and crimes against humanity to the list of international wrongs. Both of these wrongs are massive assaults against civilians; the only difference between them is that genocide requires the specific intent to exterminate a group. Conceptually then, genocide is a species of crimes against humanity. Genocide was, of course, established as an international wrong by the Nuremberg trials and the 1948 Genocide Convention.<sup>22</sup> Crimes against humanity arose out of a combination of the 1948 Nuremberg trials and

19. Whether it is the Armenian state or the Armenian community.

20. Perhaps there should be a principle of subsidiarity in cases of wrongs committed by a state against its own nationals. This would mean that issues of *international* responsibility would arise only if the domestic courts of the state are unable or unwilling to hear the victim's claims. This is the case with regard to the Armenian massacres. As a general matter, the principles of state succession apply to responsibility for crimes against humanity. For a detailed study of the issue in relation to responsibility toward other states, see PATRICK DUMBERY, *STATE SUCCESSION TO INTERNATIONAL RESPONSIBILITY* 124–34 (2007).

21. The arguments that follow were offered by several international law experts assembled at a conference in Lebanon in January 2012 convened by the Armenian Orthodox Church. The Author participated in that conference. These arguments have not yet been published. The positivist view on nonretroactivity is shared, not surprisingly, by the Turkish government. See Michael Sercan Daventry, *What Is the Turkish Position on the Armenian Genocide?* 31 (June 2008) (unpublished Ph.D. dissertation, University of London), available at [www.academia.edu/237643/What\\_is\\_the\\_Turkish\\_position\\_on\\_the\\_Armenian\\_genocide\\_June\\_2008](http://www.academia.edu/237643/What_is_the_Turkish_position_on_the_Armenian_genocide_June_2008); see also *Armenian Issue Revisited*, ASSEMBLY TURKISH A.M. ASSOCIATIONS, [www.ataa.org/reference/facts-ataa.html](http://www.ataa.org/reference/facts-ataa.html) (last visited Feb. 20, 2014) (stating that genocide did not exist before 1944).

22. See Genocide Convention, *supra* note 10, art. 2.

subsequent treaties and various incarnations of state practice, culminating with the Rome Statute of the International Criminal Court.<sup>23</sup>

These new international wrongs, then, were codified in international law *after* 1945. The general consensus is that, with a few exceptions, there was no meaningful law of human rights before then. The treatment by a state of its subjects was a purely domestic matter with which international law was not concerned. Repellent as that may sound to our modern ears, prior to 1945 governments had no formal international legal constraints on how they treated their own citizens.

Now, the law of state responsibility is clear. As I indicated, “an act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.”<sup>24</sup> Simply put, under this rule, the developments since 1945, including the Nuremberg rulings and the Genocide Convention, cannot be applied retroactively. Although the Genocide Convention does not indicate whether it is supposed to apply retroactively, general principles of the law of treaties suggest a negative answer.<sup>25</sup> Because the massacres of 1915 concerned exclusively the Ottoman government’s dealings with Ottoman citizens—the Armenians were subjects of the Ottoman Empire—international law *at the time* did not include these events, horrific as they were, among the international wrongs for which states can be held responsible today. This nonretroactivity rule, again, applies both to the Genocide Convention and to related state practice that established the wrongfulness of crimes against humanity. On this positivist account, Turkey cannot be held responsible today for an act that did not constitute an international wrong at the time of commission by a previous government.

The nonretroactivity argument is independent of other considerations, for example, the view that any legal cause of action, if there ever was one, has run the statute of limitations—in international law language, has prescribed—given that almost one hundred years have passed. The prescription argument is dubious in view of the nature of the crime.<sup>26</sup> But at any rate, the question of substantive responsibility is conceptually

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23. Rome Statute, *supra* note 3, art. 7.

24. ASR, *supra* note 13, at 27.

25. Article 28 of the Vienna Convention on the Law of Treaties reads, Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

26. Today, these crimes are considered imprescriptible. See Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, *opened for signature* Dec. 16, 1968, 754 U.N.T.S. 73.

prior to the question of prescription, and I am focusing on only the former. Under the view we are considering, Turkey is not internationally responsible today because Turkey was not internationally responsible then, prescription or not.

This view is positivist because it assumes that international law is entirely conventional. It is created by states—and maybe others—only by treaty or custom. International law is the child of diplomatic history; its rules are determined only by pointing to specific social facts—treaties and state practice. Because international law did not recognize violence by a state against its own subjects as a crime in 1915, the Ottoman Empire was not internationally responsible then, and consequently the state of Turkey, its successor, is not responsible now.

However, a positivist approach to the issue of retroactivity need not be so simple. Positivists have some resources to rebut the presumption of nonretroactivity. The first one is that the international community may decide *today* that a new norm will be retroactive. After all, the ASR concedes that nothing in its text precludes or affects responsibility arising out of a peremptory norm of international law—*ius cogens*.<sup>27</sup> So if the international community enacts, by treaty or custom, a new peremptory norm that establishes the retroactivity of present norms criminalizing massive acts of violence against civilians, then Turkey can be held responsible after all. In other words, nonretroactivity is a *contingent* principle, one we generally favor for reasons of fairness. It is not a *conceptual* feature of legal rules. As the prominent positivist Hans Kelsen said, “Nothing prevents us from applying a norm as a scheme of interpretation, a standard of evaluation, to facts which occurred before the moment when the norm came into existence.”<sup>28</sup>

Of course, this requires a treaty or custom binding on Turkey that establishes the retroactivity of these new norms. That norm, however, has not been established, and it is highly unlikely that the international community will formally enact a rule of retroactivity that would expose its most powerful members to scrutiny for crimes committed in the distant past.<sup>29</sup> Therefore, this attempt to establish Turkey’s current responsibility for a past wrong is unavailable to the positivist.

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27. ASR, *supra* note 13, at 28.

28. HANS KELSEN, GENERAL THEORY OF LAW AND STATE 43 (Anders Wedberg trans., 1961).

29. For example, think about the United States’ history with Native Americans or Russia’s history with Stalin’s purges.

A second positivist move is to argue that the prohibition of state-conducted mass murder *was* an international crime in the positivist's sense in 1915 after all. This argument has two slightly different variations. The first one suggests that the Genocide Convention has retroactive reach because it crystallized preexisting customary law. The second one likewise claims that genocide was a crime in 1915, regardless of whether this means that the convention applies retroactively. On this latter version, we do not need to decide whether the convention can be applied retroactively; all we need is to establish that customary law prohibited mass murder of nationals circa 1915.

In order to do this, a positivist may point out that contemporary documents and communications can be interpreted as establishing the wrongfulness of state-conducted mass murder. If so, they cover the Armenian massacres. An argument of this sort uses a loose concept of customary law: these documents and communications, even apart from prior or contemporary practice, are evidence of, or amount to, custom. The documents in question are communications that the Triple Entente addressed to the Ottoman Empire.<sup>30</sup> They read, "[T]he Allied governments announce publicly that they will hold all the members of the Ottoman Government, as well as such of their agents as are implicated, personally responsible for such matters."<sup>31</sup> On this view, these pronouncements are evidence that international law circa 1915 considered these actions as international wrongs—as state and individual crimes. They constitute *opinio juris*, which, coupled to subsequent developments, show that the law of international crimes predates 1945, contrary to what is commonly thought.

I find this argument unpersuasive on positivist grounds. For, if conventional wisdom is correct and there was no law of human rights in 1915, then these communications either did not intend to make a legal point, in which case they cannot possibly be *opinio juris*, or if they were meant to make a legal point, they were simply wrong and Turkey cannot be held responsible today by mistaken assessments of the law made by Turkey's *enemies* in 1915. It seems to me that this customary law argument is a rather contrived attempt to recognize the obvious—that it was always wrong for states to mass murder their subjects—by dressing it in positivist garments. I think the best reading of those statements is that they recognized, then, that a state that committed these atrocities was acting contrary to international law, custom or no custom. That is why I believe these pronouncements were significant, but not as evidence

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30. See *Armenian Genocide*, UNITED HUM. RTS. COUNCIL, [http://www.unitedhumanrights.org/genocide/armenian\\_genocide.htm](http://www.unitedhumanrights.org/genocide/armenian_genocide.htm) (last visited Feb. 20, 2014).

31. *Id.*

of positivist custom. As I will try to show, they were correct assessments of international law understood in a nonpositivist way.

A final positivist move relies on the Nuremberg trials. The Nuremberg court apparently applied the Act of London of 1945, which criminalized the defendants' acts, to events preceding the Act.<sup>32</sup> The argument for Turkey's responsibility would then be that Nuremberg is a valid precedent for the retroactivity of international norms that establish massive violence against civilians as international wrongs. So we can now "pull a Nuremberg" on Turkey. If the Nuremberg opinion is valid precedent, then its reasoning applies to Turkey today.

But this, again, is unpersuasive on positivist grounds. For one thing, the Nuremberg court could have been wrong in applying the London Act retroactively; indeed, the court had trouble citing any precedent justifying retroactivity.<sup>33</sup> But more important, the Nuremberg trials were *criminal* trials. The court was able to judge the criminal intent of the defendants appearing before it. An important link in the court's reasoning was that the defendants "had to know" that their acts were criminal.<sup>34</sup> In contrast, the individuals who rule Turkey today had nothing to do with the crimes, and so the Nuremberg grounds for retroactivity, based as they were on intent, cannot apply given that all relevant protagonists are long dead. Still, as with the previous issue, there is an important *nonpositivist* point that the Nuremberg court made: the massacres conducted by the Germans *were* crimes circa 1938, not because the Nuremberg judgments correctly assessed custom but because the court accurately saw that a reasonable construction of the principle of state sovereignty entailed the criminality of the defendants' acts.

As I said, these positivist moves to demonstrate the illegality of Turkey's behavior in 1915 are contrived ways of stating the obvious, namely that, to any reasonable person, the Armenian massacres *were* crimes in 1915. They were international law crimes that generate responsibility today. This is not because a properly modified concept of custom points to that conclusion. The Triple Entente in 1915 and the Nuremberg court accurately saw that these massive acts of violence were international

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32. See Opening Statement of Robert Jackson, in DAVID LUBAN ET AL., *INTERNATIONAL AND TRANSNATIONAL CRIMINAL LAW* 77, 77–81 (2010).

33. For a contemporary criticism of the trials, see Charles E. Wyzanski, Jr., *Dangerous Precedent*, ATLANTIC, Apr. 1946, at 66.

34. See AUGUST VON KNIERIEM, *THE NUREMBERG TRIALS* 218 (Elizabeth D. Schmitt trans., 1959).

wrongs, but what they saw was not custom or treaty. Their judgment about the illegality of those acts was not grounded on any concrete legal materials or state practice. The pedigree of the norm that prohibits state-conducted mass murder is not a positivist pedigree, where *positivist pedigree* denotes the property of having been created by treaty or custom.

#### IV. NATURAL LAW AS PART OF INTERNATIONAL LAW

Instead, the international wrong of state-conducted mass murder is grounded in a simple analysis of the core concept of international law. In order to make my case, I will use two different though compatible arguments. First, the view that states in 1915 were legally permitted to massively assault their subjects is incompatible with the concept of a state as it was understood in 1915. Second, the view that states in 1915 were permitted to perpetrate such actions does not meet what I call the "test of the impartial observer." What I mean is that the wrongfulness of state-conducted mass murder would have been apparent to any impartial observer called upon to pass on that issue in 1915. Take those in turn.

##### *A. Mass Murder and the Concept of the State*

Since its inception, international law was meant to regulate the interaction between independent communities. We all know that international law today has broader coverage, but at the very least, international law is supposed to lay the rules of conduct among communities organized as sovereign states. This original function endures today but was even more important during the past few centuries when international law evolved. Central to this idea is, of course, the concept of a state. What is a state? Minimally, a state is a population living in a territory ruled by a government.<sup>35</sup> The power exercised by the government should be effective because effectiveness is a precondition for maintaining a reasonable relationship with other states. If states are incapable of maintaining internal order, then international law cannot regulate interstate relations effectively.

But this law and order function is, on closer analysis, a protective function.<sup>36</sup> The government must rule effectively in order to protect us

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35. Thus, Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States reads, "The state as a person of international law should possess the following qualifications: *a*) a permanent population; *b*) a defined territory; *c*) government; and *d*) capacity to enter into relations with the other states." Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19.

36. By using the term *protective*, I do not mean to buy wholesale the modern *responsibility to protect* concept, although it overlaps some with what I say in the text.

from one another and from external enemies, as Hobbes and Locke argued. It must have the power to fulfill this dual protective role. This is a minimalist concept of the state, an idea, I hope, that will be shared by almost everyone regardless of differences in opinion about what *other* legitimate tasks states may perform.<sup>37</sup>

If this is correct, then the claim that the state is permitted to commit mass murder against its own subjects contradicts the concept of the state. International law *assumes* that states will minimally protect their citizens. This elementary normative concept does not require democracy, not even respect for human rights as we understand them today. It merely excludes state-conducted mass murder because such behavior is inconsistent with the assumption that underlies international law: governments will take care of their subjects. That does not mean that international law thus conceived required states in 1915 to respect their subjects' liberties or possessions, much as we would require that today. I do not even assume that this crude concept of international law prohibited states from killing some subjects if they thought it was required in some way to fulfill their protective function, although if pressed I would not concede this. I have to assume only that, whatever else governments may do, they are at least required not to massively murder their subjects.

It might help to compare this argument with the method followed by St. Thomas Aquinas. Aquinas famously defined *law* as "a rational ordering of things which concern the common good; promulgated by whoever is charged with the care of the community."<sup>38</sup> Critics have considered this definition inadequate because it excludes iniquitous legal systems, given that these, by definition, have not been promulgated for the common good. I think this is an uncharitable reading of Aquinas. His point is not that all laws are in fact enacted for the common good. Rather, his point is that laws are *supposed* to be for the common good. They are supposed to have a public purpose. Aquinas makes the important point that the concept of law contains an evaluative element. The law is supposed to be for the benefit of the subjects, for the common good. This is a true element of law, whether we conceive the idea of common good as deontological, utilitarian, virtue based, or some combination. Perhaps,

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37. Other tasks could include realizing equality, promoting prosperity, supplying public goods, and so forth.

38. ST. THOMAS AQUINAS, SUMMA THEOLOGICA q. 90, art. 4, *as reprinted in* M.D.A. FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE 142, 143 (7th ed. 2001).

as Kant thought, good laws are those that would receive the assent of all rational persons, even those whom the law harms.<sup>39</sup> If my taxes go up to alleviate poverty, they are rationally justified to me, even if I have to pay more than I would like. If my taxes go up instead to enrich the government's friends who help it win elections, then they are unjustified. Now laws that actually do not pursue the common good are "corruptions of law." They are imperfect, but that does not mean that we do not owe them allegiance all things considered.<sup>40</sup> Maybe I have to put up with unjust taxes because all things considered the legal system is generally just, or it causes more harm than good, or my disobedience would make things worse.

Just as the idea that laws are supposed to be for the common good is a conceptual truth about the law, the idea that states are supposed to protect their subjects is a conceptual truth about the state. Massive violations of this protective purpose do not disqualify the state as such—they are "corruptions" of the state—but they are internationally wrongful. The sense in which state-conducted mass murder is a violation of international law, even if we can point to no treaty or custom saying so, is that international law is anchored in a given conception of the state. This conception is not purely descriptive: it carries with it normative implications. One of those implications is that states are supposed to minimally protect their subjects. States that massively murder their subjects betray their *raison d'être*. This violation is an international wrong, then, because the protective function is implicit in the concept of the state, which in turn is the central concept upon which international law rests.

Notice two claims I do not make. First, I do not claim that Turkey ceased being a state because of this massive violation of its protective role. Indeed, world powers continued to deal with Turkey as a state. I merely claim that the Armenian mass murders constituted an international wrong in 1915 regardless of the fact that the treaty or custom did not specifically codify the crime. Second, and more important, I do not make the argument that the mass murders were so horrific that they were unlawful, perhaps on the assumption that acts that shock the moral conscience are necessarily illegal. Such an argument requires a more robust conception of natural law than the one I defend here. Under a more robust conception, there is a list of natural law crimes—crimes defined by a correct theory of morality that is simultaneously part and

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39. See IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 25–26 (Mary Gregor ed. & trans., Cambridge Univ. Press 1996) (1797); ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY* 182–231 (2009).

40. See A. JOHN SIMMONS, *Philosophical Anarchism, in JUSTIFICATION AND LEGITIMACY: ESSAYS ON RIGHTS AND OBLIGATIONS* 102, 109 (2001).



parcel of international law. I think this robust view is eminently defensible, but I do not attempt that defense here.<sup>41</sup> In this Article I make the much more modest claim that mass murder contradicts the protective function embodied in the concept of the state as it stands now and as it stood in 1915.

My argument does not deny either that international law is importantly conventional. I concede that the concept of the state is conventional but claim that the prohibition of mass murder follows from *this conventional concept*. The positivist, in contrast, bars these inferences. To him, for state-conducted mass murder to be an international wrong, the international community has to create a *separate* rule that prohibits that act. So to the positivist, the concept of the state is conventional but has no further normative implications. I find this view of law impoverished. Think about the concept of a parent, for example.<sup>42</sup> We would say that being a parent naturally entails some responsibilities, that, as Dworkin would say, there is a *principle* embodied in the idea of *parent* that is as much part of the legal concept as the descriptive dimension of the concept.<sup>43</sup> One could say, then, that an intelligent interpretation of the word *state* acknowledges that states exist for some purpose and that this act, the act of genocide, is incompatible with that purpose. This kind of reasoning does not require us to depart from conventional rules, nor does it force us to deny that law is importantly conventional. For one thing, even if natural law norms exist, we need convention to make those rules determinate and define their boundaries with reasonable precision. Perhaps natural law says that the resources of the sea should be fairly shared by all states, but we need the Law of the Sea Convention to work out the details.<sup>44</sup> Perhaps natural law says that treaties must be honored, but we need the Vienna Convention to specify how and under what circumstances treaties are made and terminated.<sup>45</sup> The prohibition of state-conducted mass murder is quite determinate, but even here we need the laws of war, or the emergency clauses in human rights treaties, to specify when and how the state may permissibly kill people.

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41. See generally FERNANDO R. TESÓN, A PHILOSOPHY OF INTERNATIONAL LAW (1998) (arguing that international law should be interpreted as incorporating philosophical insights).

42. I thank Jim Nickel for the example.

43. See Mark Greenberg, *How Facts Make Law*, 10 LEGAL THEORY 157, 158 (2004).

44. U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

45. Vienna Convention, *supra* note 25.

My point is that the mass-murder prohibition is natural in a way that does not deny, but rather supplements, the conventionality of international law. This position is not vulnerable to the charge that should it be allowed, then anything goes and international law would be an amorphous tool in the hands of philosophers. Law is, and remains, importantly conventional. The concept of the state itself is a conventional concept—after all, for a long time, there were no states. However, the fact that the concept is conventional does not prevent disaggregating its semantic layers. To assert “this is a state” implies that we should have an answer to the question “and what are states for?” At the very least, I suggest, states are for protection. And this protective function excludes, again, at the very least, the permission of exterminating their subjects.

For those who recoil at the idea of invoking the unfashionable authority of Aquinas, my argument can be reformulated in modern language. Simply put, in order to determine the content of international law, we must necessarily use not just descriptive facts but values as well.<sup>46</sup> Trying to determine how exactly social facts determine the content of the law requires giving *reasons*. The determination of legal content is thus not exhausted by the facts in question because those facts do not provide sufficient information to make that determination. Instead, we determine legal content by reasoning about the *practices*—treaty and custom. We engage in rational determination: “Value facts are needed to determine the legal relevance of different aspects of law practices.”<sup>47</sup> This, I contend, is a necessary truth. A difference between positivists and antipositivists about the content of the law is therefore not a debate about the nature of law; instead, it is a contest between the different reasons that each side gives to make the legal determination from facts to legal content. When positivists say that states in 1915 were legally allowed to massacre their subjects, they are not making a value-neutral legal determination. Their view is supported by values that differ from the values of those who claim that states in 1915 were not allowed to massacre their subjects.<sup>48</sup>

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46. I follow here Greenberg, *supra* note 43, at 158.

47. *Id.* at 160.

48. Here is Greenberg’s account of the argument:

It is, I claim, a general truth that a domain of descriptive facts can rationally determine facts in a dependent, higher-level domain only in combination with truths about which aspects of the descriptive, lower-level facts are relevant to the higher-level domain and what their relevance is. Without the standards provided by such truths, it is indeterminate which candidate facts in the higher-level domain are most supported by the lower-level facts. There is a further question about the source or nature of the needed truths (about the relevance of the descriptive facts to the higher-level domain). In the legal case, these truths are, I will suggest, truths about value.

*Id.* at 161.

The concept of the state is best understood as containing a prohibition of mass murder of its subjects. It is a concept of the state supported by the better reasons in the determination of legal content—in this case, a determination of the legal responsibility of present-day Turkey for the events of 1915.

### *B. The Impartial Observer Test*

Suppose an unbiased observer would have been asked in 1915 the following question: “Is it lawful for a state to murder 1.5 million of its subjects?” The answer, almost surely, would have been a resounding “no.” But why? Because in 1915 it was self-evident that states could not permissibly do that. Here we can see the significance of the communications by the Triple Entente. The actions by the Ottoman Empire were simply unacceptable, shocking, to any normal observer. It is true that these nations were Turkey’s enemies, but nonetheless, the position by the Entente was against interest because the implication is that these nations, too, were precluded from massively murdering their subjects. It is significant that they did not have any qualms in warning the Ottoman rulers that they would be held accountable for their behavior. Their language was couched in law, not in morality. Surely it would have been a respectable legal argument for condemning the Soviet purges in the 1930s and 1940s to cite, estoppel-like, to the 1915 Triple Entente’s communication on the Armenian massacres. The best interpretation of these facts, then, is that these governments saw that these massacres were not within the legal discretion of the Ottoman Empire. It did not occur to them or to anyone at the time to make the argument that present-day positivists make: Turkey was legally allowed to massacre its subjects.

It is important to carefully confine the reach of the impartial observer test. It is not a conclusive test, and it is parasitic on my first conceptual point. Suppose the issue is whether slavery is illegal. I think our impartial observer would have said so in the United States in the 1800s. But I am not sure if an impartial observer would have said the same thing in ancient Greece. Whatever our views on moral objectivity and the moral fabric of the universe, the impartial observer test is context dependent. It imagines someone who is unbiased in the context of the time and place in which the person is observing events. For example, the impartial observer in 1915 would not have said that states are permitted to massacre their subjects but would have perhaps agreed that governments could permissibly suppress dissent. There are no inferences from the

impartial observer's dictum about massacres in 1915 to universal truths about massacres or any other legal or moral practices, in that time or in any other time. Nor do I offer any independent foundation for the impartial observer test except stating it in an intuitive way as a confirmation of the conceptual point about the intrinsic protective role of the state. I do not believe that the impartial observer would have said things such as, "Sure, Turkey would be *morally* wrong to murder its subjects, but it is *legally* permitted to do so." One who makes this distinction, I contend, has the burden of proof, not the other way around.

### *C. The Objection from Arbitrariness*

One could object that these evaluative considerations built into the definition of *international law* inevitably lead to arbitrariness. The idea is that, for good or ill, natural law analysis is a thing of the past and the international community has settled on different law-creating methods. Broadly speaking, these are custom and treaty. Anything else opens the door to arbitrary preferences parading as law.

I have three replies. The first I already gave: the positivist's legal determination also uses values. Legal content cannot, as a conceptual matter, be determined solely by appealing to social facts. Second and related, the method I propose is more transparent than the practice in which many international lawyers indulge. Much of what passes as "custom" in international law circles is in reality the expression of a value held by the advocate or court, a value that has not ostensibly been codified by any positivist source but that the speaker promotes in positivist disguise. I can give plenty of examples. Courts routinely apply rules based on "general practice" without pointing out where that practice comes from. International human rights advocates routinely argue that "such and such" norm is custom by citing all kinds of nonauthoritative sources. I call this practice "fake custom." Practitioners of fake custom resort to a number of techniques. Their arguments are really evaluative arguments, yet appear to be positivist arguments because they cite various kinds of concrete sources. Some favorite sources of fake custom are nonbinding resolutions, speeches, memoranda, and the like that contain the rule in question. Another favorite positivist technique is to cite adoption of the norm in question by any number of domestic legislations. The precautionary principle in environmental law is an example of this. Some environmental activists cite the adoption of the principle by some

states as evidence that it is a rule of customary law.<sup>49</sup> This would mean, of course, that those states can legislate for the entire world.

Advocates and courts want to maintain the positivist illusion—the illusion that the norms they favor come from positivist sources, that they are not therefore arbitrary pieces of advocacy. But this is a mirage prompted by the desire to avoid the charge of arbitrariness—the charge that one is making up international rules out of thin air. This contrived positivist stance is glaring in the case of bad customary law arguments, but it is also common in treaty interpretation. I do not pursue this large issue here, but I agree with Dworkin's interpretivist views.<sup>50</sup> Treaties and practices have to be interpreted in the light of the moral and political principles that plausibly underlie those practices. A good interpretation is one that puts those practices in the best possible light. My natural law approach, then, does not try to conceal the fact that propositions of law are necessarily normative in that broader sense. It does not pretend to find the wrongfulness of mass murder in some nonexistent state practice. It simply points out that the best interpretation of the concept of statehood circa 1915 includes a prohibition of mass murder, document or no document, practice or no practice. My natural law approach recognizes from the outset that some norms are part of the law even if they fail the positivist pedigree test. Thus, for example, a good argument for the precautionary principle would be a substantive argument showing why the principle is rationally required, if it is required, to avoid environmental collapse. That argument would openly acknowledge that evaluative considerations of various kinds, including considerations of efficiency, are part and parcel of legal reasoning. It would not try to reformulate those evaluative considerations in the positivist language of custom.

My third reply insists on the modest reach of my argument. Unlike Grotius and Vitoria, I do not claim that natural law provides an answer to all questions of international law.<sup>51</sup> It does not answer matters of detail

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49. See, e.g., James Cameron & Juli Abouchar, *The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment*, 14 B.C. INT'L & COMP. L. REV. 1, 27 (1991).

50. See RONALD DWORKIN, *LAW'S EMPIRE* 45–86 (1986).

51. See generally FRANCISCO DE VITORIA, *On the Law of War*, in VITORIA: *POLITICAL WRITINGS* 293 (Anthony Pagden & Jeremy Lawrance eds., 1991) (addressing in detail numerous areas of international law as mandated by reason); 1 HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* (Richard Tuck ed., Liberty Fund 2005) (1625) (same).

such as the breadth of the territorial sea, the precise detail of the laws of war, or whether compensation for wrongs should make the victim whole. I am even agnostic in this Article, as I said, about what human rights governments must observe or what political regimes are or are not legitimate.<sup>52</sup> My claim is quite basic: a legal permission for states to massively murder their own citizens is inconsistent with the concept of the state and therefore with the concept of international law because it rests in turn on the idea of a state. This was true in 1915, and it is true today. The impartial observer procedure I suggested tests this conceptual truth.

## V. CONCLUSION

The question of Turkish responsibility for the Armenian massacres illustrates a larger jurisprudential point. The information needed to make substantive legal judgments is not and cannot be exhaustively contained in a purely descriptive account of the sources of international law. Faced with this type of problem, one can proceed in three ways. One is to insist that the norms of international law are those established by diplomatic history—custom and treaty. If those processes did not yield the norm in question in 1915, then the norm did not exist—it was not a valid norm—in 1915. This is the standard positivist position described above. A second strategy is to attempt to squeeze the desired norm, say, the prohibition of mass murder, out of positivist sources. One could say, for example, that the state is a historical construct established by practice. After all, there was a time when there were no states. And, *as a matter of custom*, the norm existed in 1915 as part of the rule that defines states. As I indicated, I think this position is contrived because it stubbornly clings to the view that legal propositions are exhaustively contained in positivist sources. Finally, the third position, the one I favor, is to openly acknowledge that at least some of the information that we need to formulate legal norms is not traceable to positivist sources but found instead in evaluative considerations, in intelligent practical reasoning.

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52. Loren Lomasky and I address the question of state legitimacy in our book *Justice at a Distance: A Classical-Liberal Approach to Global Justice* (forthcoming 2014).